Supreme Court, U. S.
FILED
OCT 12 1979
MICHAEL RODAK, JR., CLERK

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1979

**No. 79-408**

CITY OF MILWAUKEE, THE SEWERAGE COMMISSION OF THE CITY OF MILWAUKEE, AND THE METROPOLITAN SEWERAGE COMMISSION OF THE COUNTY OF MILWAUKEE,

*Petitioners,*

*vs.*

PEOPLE OF THE STATE OF ILLINOIS AND PEOPLE OF THE STATE OF MICHIGAN,

*Respondents.*

## BRIEF OF THE STATE OF ILLINOIS IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI.

WILLIAM J. SCOTT,
Attorney General of the State of Illinois,
JOSEPH V. KARAGANIS,
SANFORD R. GAIL,
Special Assistant Attorneys General,
KARAGANIS & GAIL LTD.,
150 North Wacker Drive,
Chicago, Illinois 60606,
(312) 782-1905.

October 11, 1979.

Gunthorp-Warren Printing Company, Chicago • Financial 6-6565

## INDEX.


PAGE

Questions Presented ..... v

Statement of the Case ..... 1

A. Introduction ..... 1

B. Defendants' Sewage Collection System ..... 2

C. The Health Hazards of Untreated Sewage ..... 5

D. The Transport of Those Disease-Causing Organisms to Illinois Waters ..... 7

E. The Procedural History of This Case ..... 8

F. The Remedy Ordered by the District Court ..... 10

G. The Decision by the Court of Appeals ..... 12

Reasons for Denying the Writ ..... 16

I. The District Court's Collection Order Is Not Inconsistent with the Clean Water Act ..... 16

A. Congress Did Not Preempt the Imposition of More Stringent Requirements Than Those Imposed Under the Clean Water Act ..... 16

B. The Statutory Procedure Under the Act Itself Contradicts Milwaukee's Arguments ..... 20

II. Milwaukee's Evidentiary Claims Are Spurious ..... 23

III. The District Court Had *in Personam* Jurisdiction and Venue Was Proper in the District in Which the Claim Arose ..... 24

A. The District Court had *in Personam* Jurisdiction 24

B. Venue Was Proper in the District in Which the Claim Arose ..... 27

Conclusion ..... 29

CITATIONS.

*Cases.*

Board of Supervisors of Fairfax County, Virginia v. U. S., 408 F. Supp. 556 (E. D. Va. 1976) ..... 20

California Tahoe Regional Planning Agency v. Jennings, 594 F. 2d 181 (9th Cir. 1979) ..... 20

Committee for the Consideration of Jones Falls Sewage System v. Train, 539 F. 2d 1006 (4th Cir. 1976) ....18, 20

Consolidated Laboratories, Inc. v. Shandon Scientific Co., 384 F. 2d 797 (7th Cir. 1967) ..... 26

Gray v. American Radiator & Standard Corp., 22 Ill. 2d 432, 176 N. E. 2d 761 (1961) ..... 25

Honeywell, Inc. v. Metz Apparatewerke, 509 F. 2d 1137 (7th Cir. 1975) ..... 26

Illinois v. City of Milwaukee, 366 F. Supp. 298 (N. D. Ill. 1973) ..... 18

Illinois v. City of Milwaukee, 406 U. S. 91 (1972) ...8, 27, 28

International Shoe Co. v. Washington, 326 U. S. 310 (1945) ..... 25

Metropolitan Sanitary District v. United States Steel Corp., 30 Ill. App. 3d 360, 323 N. E. 2d 426 (1st Dist. 1975), *cert. den.* 424 U. S. 976 (1976) ..... 18

Mianus River Preservation Committee v. EPA, 541 F. 2d 899 (2d Cir. 1976) ..... 17

Missouri v. Illinois, 200 U. S. 496 (1906) .....23, 24

McBreen v. Beech Aircraft Corp., 543 F. 2d 26 (7th Cir. 1976) ..... 26

Nelson v. Miller, 11 Ill. 2d 378, 143 N. E. 2d 673 (1957) 25

New York v. New Jersey, 256 U. S. 296 (1921) .....23, 24

Ohio v. Wyandotte Chemicals Corp., 401 U. S. 493 (1971) ..... 9, 25, 26, 27

Pennoyer v. Neff, 95 U. S. 714 (1877) ..... 25

People ex rel. Scott v. United States Steel Corp., 40 Ill. App. 3d 607, 352 N. E. 2d 255 (1st Dist. 1976) .... 18, 19

Shaffer v. Harris, 433 U. S. 186 (1977) ..... 25

State Water Control Board v. Train, 554 F. 2d 921 (4th Cir. 1977) ..... 21

Stream Pollution Control Board of the State of Indiana v. U. S. Steel Corp., 512 F. 2d 1036 (7th Cir. 1975) 19, 28

Township of Long Beach v. City of New York, 445 F. Supp. 1023 (D. N. J. 1978) ..... 20

U. S. v. Ira S. Bushey & Sons, Inc., 363 F. Supp. 110 (D. Vt. 1973), *aff'd* 487 F. 2d 1393 (2d Cir. 1973), *cert. den.* 417 U. S. 976 (1974) ..... 20

U. S. v. Lindsay, 357 F. Supp. 784 (E. D. N. Y. 1973) ... 20

U. S. v. Outboard Marine Corp., ..... F. Supp. ....., 12 ERC 1346 (N. D. Ill. 1978) ..... 20

U. S. ex rel. Scott v. U. S. Steel, 356 F. Supp. 556 (N. D. Ill. 1973) ..... 20

Village of Glencoe v. Metropolitan Sanitary District, 23 Ill. App. 3d 868, 320 N. E. 2d 524 (1st Dist. 1974) ... 18

*Statutes.*

Judicial Code 28 U. S. C.
§ 1391(b) ..... 27, 28

Clean Water Act, 33 U. S. C. §§ 1251 *et seq.*
§ 1297 ..... 21-22
§ 1311(b)(1)(B) ..... 15, 20, 21
§ 1311(b)(1)(C) ..... 15, 18, 20, 21, 23

§ 1311(i)(1) ..... 21
§§ 1341-1344 ..... 11
§ 1365 .....18-19, 27, 28
§ 1342(k) ..... 18
§ 1370 .....16-17, 21

Illinois Civil Practice Act, Ill. Rev. Stat., Ch. 110
§ 16 .....24-25
§ 17 .....24-25

Illinois Environmental Protection Act, Ill. Rev. Stat., Ch. 111½, pars. 1001 *et seq.*
§ 1003(n) ..... 8-9
§ 1012 ..... 8-9

*Administrative Regulations.*

40 C. F. R. Part 35, Subpart E, Appendix A..... 21
40 C. F. R. Part 133..... 15

*Court Rules.*

Fed. R. Civ. P. 4(e)..... 24
Fed. R. Civ. P. 52.....7, 13

*Other Authorities.*

Library of Congress, Congressional Research Service, *A Legislative History of the Water Pollution Control Act Amendments of 1972*.....17, 18, 19, 22
Restatement, Conflict of Laws § 377..... 27

## QUESTIONS PRESENTED.

I. Were the district court's findings that viral and bacterial pathogens discharged by defendants contaminated Illinois waters and that defendants' discharges made a significant contribution to the eutrophication of Lake Michigan "clearly erroneous"?

II. Has Congress, in Public Law 92-500 as amended by Public Law 95-217, prohibited the states from seeking the imposition of more stringent treatment than the national minimum levels of treatment through the use of state statutes, federal common law or state common law?

III. Did the district court have *in personam* jurisdiction, and was venue proper in the district in which the injury occurred?

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1979

---

**No. 79-408**

---

CITY OF MILWAUKEE, THE SEWERAGE COMMISSION OF THE CITY OF MILWAUKEE, AND THE METROPOLITAN SEWERAGE COMMISSION OF THE COUNTY OF MILWAUKEE,

*Petitioners,*

*vs.*

PEOPLE OF THE STATE OF ILLINOIS AND PEOPLE OF THE STATE OF MICHIGAN,

*Respondents.*

---

## BRIEF OF THE STATE OF ILLINOIS IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI.

---

## STATEMENT OF THE CASE.

---

### A. Introduction.

Petitioners City of Milwaukee, the Sewerage Commission of the City of Milwaukee, and the Metropolitan Sewerage Commission of the County of Milwaukee (hereinafter referred to collectively as "Milwaukee") have petitioned this Court to grant a writ of certiorari to review the decision of the appellate court below. Basically, Milwaukee challenges the district court's findings of fact and the appellate court's affirmance that Milwaukee discharges enormous volumes of raw, untreated human fecal waste into Lake Michigan and that shore parallel currents transport these wastes containing billions of bacterial and viral pathogens (disease-causing agents) into Illinois waters, thus

creating a major health hazard for Illinois swimmers and for Illinois' public water supply. Beyond challenging its liability for creating a common law public health nuisance, Milwaukee seeks to challenge the basic remedy ordered by the district court and by the appellate court—*i.e.* that raw human fecal waste should be collected and transported to waste treatment facilities for treatment instead of being discharged raw into public waters.

In its petition Milwaukee seeks to gain this Court's attention by seriously misrepresenting the evidence presented to the district court, the findings and logic of the district court and appellate court, and the state of the law.

### B. Defendants' Sewage Collection System.

To properly appreciate the enormity of the raw sewage problem caused by Milwaukee, one must understand the collection system Milwaukee has built to transport raw human fecal wastes from its residential or commercial source to its treatment plants. If the public health hazard were not so great, Milwaukee's sewage collection system could be admired as the ultimate invention of Rube Goldberg. Among the system's unique features:

1. Milwaukee has consciously followed the practice of building large sewers which would be intentionally connected into smaller sewers leading to the treatment plants. When the large sewers fill up with raw sewage, the smaller sewers cannot handle the hydraulic load. Rather than build larger "downstream" sewers adequately sized to carry the hydraulic load of the large "upstream" sewers, Milwaukee has built overflow devices to pour the raw fecal wastes into the local rivers or into Lake Michigan.

2. Also unique to Milwaukee is their system of giant "flushing tunnels." The stench of the enormous volumes of raw fecal waste discharged from these overflow devices becomes so severe that the city maintains two giant "flushing tunnels" to draw in clean Lake Michigan water

to the upper reaches of the local rivers and to literally "flush" the raw fecal wastes into Lake Michigan.

In Milwaukee, the basic pattern for sewage collection is by means of a house lateral sewer connected to a municipal collector sewer under the street. The municipal collector sewer then connects to a large "interceptor" sewer system which carries fecal waste—principally by gravity flow—to a treatment plant for treatment (Tr. 118, Tr. 426). In Milwaukee this "interceptor" system is called the "MIS" or Metropolitan Interceptor System (Tr. 120, Tr. 426).

Beginning in the post-war years, Milwaukee began extending sewer service to more and more residential and commercial areas (Tr. 206). These new sewer extensions and the new sewage loads from these areas were connected to the existing interceptor system creating hydraulic overloads in the interceptor system, *i.e.* more sewage flow than the pipe can handle (Tr. 139). Not the least cause of these hydraulic overloads was defendants' conscious practice of building larger diameter sewers in outlying areas which were connected to smaller diameter sewers leading to the treatment plant.[1]

---

1. On adverse examination, Mr. Weiland, Director of Engineering for the Sewerage Commission, testified:

> Q. Isn't it correct that in the development of the Metropolitan Interceptor System, pipes of a larger capacity were connected to pipes downstream which had a lesser capacity?
> A. Yes. (Tr. 139-140.)
>
> * * * * *
>
> Q. What size sewer does that 72-inch special section sewer lead into?
> A. I believe it is a 42-inch. (Tr. 333.)
>
> * * * * *
>
> Q. And this 72-inch system in 1949 was then connected into a 42-inch system, isn't that right?
> A. Yes. (Tr. 333-334.)
>
> * * * * *
>
> Q. Wasn't the sewer built with full knowledge by the staff that the 42-inch sewer was hydraulically undersized so that it couldn't handle the load of the 72-inch sewer?

(Footnote continued on next page.)

These hydraulic overload problems are exacerbated by rain storms. In most of the Milwaukee metropolitan area the defendants have constructed "separate" sanitary and storm sewers. The sanitary sewers are the sewers intended to carry human fecal wastes to the treatment plants. However, rain water from downspouts or storm drains is often discharged into the already hydraulically overloaded sanitary sewers. The result is an exacerbation in both volume and duration of the raw sewage overflow.

Thus, while periods of hydraulic overload and resultant overflow are often associated with rainfall events, these hydraulic overloads and resultant overflows have been known to extend over both dry and wet periods and to result in continuous discharge of raw sewage into the rivers and lake for as long as 30 days.

Also discharging into this hydraulically overloaded interceptor system are a series of collector sewers that were designed to carry both storm and fecal ("sanitary") wastes ("combined" sewers). These sewers also overflow both because of hydraulic overload in these "combined" collector sewers and because the interceptor system into which these combined sewers discharge is already hydraulically overloaded due to upstream hydraulic loads.

At the present time Milwaukee maintains several hundred overflow devices or structures throughout the metropolitan area —both on the interceptor (MIS) system and on local collector sewers. Overflows of raw human fecal wastes from these devices occur approximately 50 times a year and last up to 30 days and contain billions of gallons of fecal wastes.

As noted above, Milwaukee has developed a unique system for ridding itself of the obnoxious odors and disease hazard

---

(Footnote continued from preceding page.)

A. Yes.

Q. And the staff for the commissions went ahead and built the sewer without at that time providing for adequate hydraulic capacity, isn't that correct?

A. Yes. (Tr. 334.)

represented by these raw sewage overflows. The overflows discharge either into Lake Michigan or into local rivers which then flow into Lake Michigan. In storms the rivers' flow is sufficient to move the fecal wastes from the rivers into Lake Michigan. To assist the rivers' flow in dry weather defendants maintain huge "flushing" tunnels. These tunnels draw clean Lake Michigan water into the upper reaches of the river and use that water to literally "flush" the fecal wastes out into Lake Michigan.

### C. The Health Hazards of Untreated Sewage.

The raw sewage discharged by Milwaukee contains enormous numbers of pathogenic[2] organisms, both bacteria and viruses. Any urban center like Milwaukee contains persons who are infected with pathogens and who are shedding bacterial and viral pathogens through their feces (Tr. 3101, 2174). A single gram—1/454 pound—of human feces from an infected individual can contain literally millions of viruses (Tr. 10278). Depending on the level of disease within the community, raw sewage can contain from approximately seven thousand to several hundred thousand viruses per liter (Tr. 2180).

Bacteria and viruses are two totally different pathogenic groups. Within the bacteria group there are hundreds, if not thousands, of different strains of pathogenic bacteria. For example, two common pathogenic bacteria associated with fecal matter are Salmonella and Shigella. Salmonella has over 400 different subtypes, and Shigella has over 600 different subtypes (Tr. 3053). Indeed, the total number of bacterial pathogens is not really known (Tr. 3053).

Bacterial pathogens cause diseases of severe discomfort and sometimes serious complications. Basically, when ingested these organisms cause intense diarrhea (Tr. 3054). Other bacteria—

2. The noun "pathogen" or the adjective "pathogenic" refers to the disease-causing nature of these organisms (Tr. 2155).

known as "opportunistic" pathogens—can create serious secondary infections in injured persons or serious illness in the very young or elderly (Tr. 3055).

The other and perhaps more serious group of pathogens found in fecal wastes are viruses. Viruses which pass from the body in feces are called "enteric" viruses (Tr. 2149).

A virus is an incredibly small object measuring less than one millionth of an inch in diameter (Tr. 10171). Many people who get infected by enteric viruses do not show any disease symptoms. Viruses simply multiply in the lining of the gut and are excreted with the feces without causing any disease symptoms (Tr. 2157). A thousand people may become infected before one shows a clinical symptom of the disease. Yet these asymptomatic infected carriers pass on just as many viruses as a diseased person (Tr. 2145, 2157, 2174). Thus, thousands of people can become infected and become carriers and multipliers of an enteric viral disease without any indication of the disease being present.

Actual disease symptoms only appear when a particular virus enters the bloodstream through the lymph glands (Tr. 2143) and attacks a "target" organ, such as the heart, lungs, brain or central nervous system (Tr. 2157). Polio is an enteric virus that attacks the tissue of the spinal cord (Tr. 2161, 2165). Coxsackie virus causes pleurodynia—a disease of the covering of the lungs which causes a great deal of inflammation and pain (Tr. 2164). Coxsackie B virus has as its target organ the muscle tissue of the heart causing such diseases as pericarditis (Tr. 2167) and myocarditis. Myocarditis is a particularly severe and sometimes fatal heart disease in young children (Tr. 2160). Coxsackie viruses also have been found to increase the incidence of birth defects (Tr. 2167) and are suspected of triggering diabetes in susceptible individuals (Tr. 13211). Hepatitis A is an enteric virus which attacks the liver (Tr. 2168).

The common denominator of all these enteric viruses is that they leave the body of a carrier by means of the feces

(Tr. 2147). Thus, fecal material is a necessary link in the transmission of the virus to the next victim. This is called "fecal-oral transmission" (Tr. 2155).

Viruses are incredibly difficult to detect with accuracy. The common test is to place suspected viral fluid on a bed of animal or human embryo tissue. If the tissue on the cell becomes infected, the number of infected areas are counted as plaque-forming units (Tr. 2179). Unfortunately, this test is very inaccurate and will not detect known viruses. For example, Hepatitis A cannot be grown or isolated with the test (Tr. 10193). Many viruses will only grow in certain types of cell tissue and will not show up in other virus tests at all (Tr. 12134, 12320). Moreover, because viral particles are not distributed uniformly through a volume of liquid, it is possible to completely miss substantial quantities of viruses under standard testing techniques (Tr. 12333).

### D. The Transport of Those Disease-Causing Organisms to Illinois Waters.

The Court of Appeals below summarized the district court's findings regarding transport of these disease-causing organisms as follows:

> The district court found that the defendants dump substantial quantities of pathogen-containing sewage into Lake Michigan each year, that the lake currents carry the pathogens into Illinois waters, where they may infect drinking water supplies and pose a danger to swimmers, and therefore that defendants' actions pose a significant risk of injury to Illinois residents. These findings are not clearly erroneous. Rule 52, Fed. R. Civ. P. (Appendix A-26 to A-27.)
>
> The district court found that "bacteria and viruses numbering literally in the millions are transported live and intact from Milwaukee to Illinois waters." [Tr. 14217.] This finding is not clearly erroneous. (Appendix B-10.)

There is no need here to extensively discuss the evidence of transport of these pathogens. The Court of Appeals discusses the evidence at length. (*See* Appendix A-29 to A-30; B-10 to B-25.) It is sufficient to observe that even defendants' own experts—based on their own tests in Lake Michigan—admitted that Milwaukee's sewage is carried by prevailing currents into Illinois waters several times a year (Tr. 7175; 8931).

### E. The Procedural History of This Case.

Milwaukee's enormous discharges of raw sewage into Lake Michigan and thence into Illinois waters led Illinois to bring an original action before this Court in 1971. In 1972 this Court held that Milwaukee was not a state for purposes of mandatory original jurisdiction by the Supreme Court over actions between the states under 28 U. S. C. § 1251(a)(1). This Court did hold, however, that Illinois could bring an original action against Milwaukee in the federal district court under the doctrine of federal common law nuisance. *Illinois* v. *City of Milwaukee,* 406 U. S. 91 (1972).

In 1972 Illinois filed a complaint in federal District Court seeking to abate Milwaukee's fecal discharges.[3] The complaint was in three counts. Count I charged Milwaukee with the creation of a federal common law nuisance. Count II charged Milwaukee with violation of statutory prohibitions against water pollution contained in the Illinois Environmental Protection Act. Ill. Rev. Stat. Ch. 111½ § 1001 *et seq.*[4]

---

3. In addition to the raw sewage discharges, Illinois also sought relief against the discharge of improperly and inadequately treated sewage that reached Milwaukee's two treatment plants. The remedial order of the district court regarding such treatment and the overturning of that order on the basis of extra-record factual assumptions is the subject of the State of Illinois' Petition for a Writ of Certiorari, filed October 5, 1979 (No. 79-571).

4. Ill. Rev. Stat. Ch. 111½, § 1012 states in part:

No person shall:

(a) Cause or threaten or allow the discharge of any contaminants into the environment *in any State so as to cause*

(Footnote continued on next page.)

Count III charged Milwaukee with the creation of a common law nuisance under Illinois law pursuant to the remedy articulated in *Ohio* v. *Wyandotte Chemicals Corp.*, 401 U. S. 493 (1971).

The case came to trial in January, 1977. After hearing months of testimony and reviewing hundreds of exhibits, the district court entered judgment finding defendants' discharges constituted:

(a) a federal common law nuisance;

(b) a common law nuisance under Illinois state law;

(c) a violation of the Illinois Environmental Protection Act which prohibits any acts which may cause water pollution in Illinois (Appendix F-2, F-24).

The basis of defendants' liability was two-fold. First, the district court found that Milwaukee's enormous discharges of raw and partially treated sewage created a serious health hazard to the residents of the State of Illinois (Appendix F-6 to F-8; F-15. *See* Court of Appeals decision and order, Appendix A-26 to A-27; B-2 to B-25).

As a second basis of liability, the district court found that Milwaukee's discharges contained huge amounts of phosphorus and other nutrients which are accelerating eutrophication of Lake Michigan and are causing taste and odor problems, un-

---

(Footnote continued from preceding page.)

> *or tend to cause water pollution in Illinois, either alone or in combination with matter from other sources,* or so as to violate regulations or standards adopted by the Pollution Control Board under this Act. (Emphasis added.)

Ill. Rev. Stat. Ch. 111½, § 1003(n), defines "water pollution" as:

> [S]uch alteration of the physical, thermal, chemical, biological or radioactive properties of any waters of the State, or such discharge of any contaminant into any waters of the State, *as will or is likely to create a nuisance* or render such waters harmful or detrimental or injurious to public health, safety or welfare, or to domestic, commercial, industrial, agricultural, recreational, or other legitimate uses, or to livestock, wild animals, birds, fish, or other aquatic life. (Emphasis added)

pleasant bathing conditions and a hostile environment to aquatic life (Appendix F-16 to F-20).

### F. The Remedy Ordered by the District Court.

The remedy ordered by the district court is rather simple in its logic and evidentiary basis:

1. *Collection.* The district court ordered that all of the raw sewage be collected for treatment instead of being discharged raw into Lake Michigan.

2. *Treatment.* The district court then ordered that all of the raw sewage—once collected—be treated to destroy the disease-causing organisms in the sewage.[5]

Several important procedural observations are necessary here. The district court did not select or dictate the method or the time schedule for achieving collection of sewage. The evidence had established several methods for effective collection. These methods included:

1. Sewer separation, *i.e.* taking the storm drainage—intentional or unintentional—out of the sanitary sewer and leaving the adequately sized sanitary sewer to carry the sewage to the plants.

2. Collection, Storage, Treatment (CST). Rather than separate the storm drainage from the sanitary waste, the design here is to collect the mixture of storm water and sewage, store it, and then gradually pump the stored wastes for treatment.

The district court did not select or order a particular method of collection:

---

5. The level of treatment ordered by the district court is not at issue in Milwaukee's Petition. As noted below the appellate court reversed the district court's treatment order on the extra-record and erroneous factual assumption that "secondary" treatment—established as a *minimum* treatment by the Clean Water Act, 33 U. S. C. §§ 1251 *et seq.*, would destroy viruses. The appellate court's action is the subject of the State of Illinois' Petition for a Writ of Certiorari.

> . . . I am not going to order any particular method to be employed at this time. I am interested in results. The methods are a matter of design. (Decision of July 29, 1977.) (Appendix F-26.)

Milwaukee—not the district court—then proceeded to select a collection, storage, treatment (CST) system as the basis of collection. The Judgment Order of which Milwaukee now complains was prepared by Milwaukee lawyers and engineers (with plaintiffs' participation) and submitted to the district court for approval on November 14, 1977.

Milwaukee not only selected the method of collection; Milwaukee also selected the timetable for collection and elimination of raw sewage overflows. This timetable calls for a staged program of overflow correction which will be completed by 1989.[6] Indeed, having negotiated the timetable with plaintiffs, having stipulated as to the feasibility of the timetable (Appendix E-2), and having submitted the timetable to the district court, Milwaukee can hardly complain about the timetable.

Moreover, there is an additional procedural aspect of the district court's order which deserves attention here. Throughout its appeal before the Seventh Circuit and in its petition here, Milwaukee continues to assert extra-record boxcar numbers as to the hundreds of millions of additional dollars the remedy ordered by the district court (and affirmed by the Court of Appeals) will cost beyond the program purportedly established by Wisconsin under the NPDES[7] permit. (*See*, e.g. Milwaukee petition, p. 22.) Yet the Judgment Order specifically provides for evidentiary hearings in the district court if Milwaukee wishes to modify the Judgment Order to allow a lower-cost remedy.

---

6. Note that under the Clean Water Act, so often misquoted by Milwaukee, the outside deadline for Publicly Owned Treatment Plants to achieve secondary or more stringent treatment is 1983, a far tighter deadline than that included by Milwaukee in the Order it now challenges.

7. National Pollutant Discharge Elimination System, 33 U. S. C. §§ 1341-1344.

> Should defendants develop information which establishes in defendants' opinion that separation of all or part of the system is a preferred alternative, which will provide a collection and treatment level equal to or better than that required herein then defendants may apply to the Court for modification of this paragraph to provide therefor. (Judgment Order.) (Appendix D-4.)

Pursuant to the Judgment Order, Milwaukee has recently submitted cost figures to the State of Illinois which show that a combination of separation and CST (Collection/Storage/Treatment) is the lowest cost alternative. The recently submitted cost figures show that defendants can achieve a higher level of protection than the district court's order at a cost *less than* or the same as the system agreed to by defendants in their state consent decree. The reason for this dramatic improvement is simple—with separation the rainfall does not get into the sanitary sewer. Thus, there will be no overflows even under the most intense storm.

Illinois does not wish to debate these extra-record issues before this Court. Suffice to say that defendants' claims of enormous cost differentials are not supported in the record and that the Judgment Order expressly provides a fact-finding mechanism for lower cost collection alternatives in the district court. Factual disputes with preliminary discovery and attendant adversarial examination are best decided by district courts and not on extra-record pronouncements by counsel on appeal.

### G. The Decision by the Court of Appeals.

On appeal of the Judgment Order by Milwaukee, the Court of Appeals affirmed the district court's finding of liability on the federal common law nuisance count.[8] In reviewing the issue

---

8. The Appellate Court declined to consider the state statutory common law counts (Appendix A-46 n. 53), a matter raised in Illinois' Petition for Certiorari.



exercise jurisdiction over these defendants on claims arising under State common law nuisance, the Court said:

> The courts of Ohio, under modern principles of the scope of subject matter and *in personam* jurisdiction, have a claim as compelling as any that can be made out for this Court to exercise jurisdiction to adjudicate the instant controversy, and they would decide it under the same common law of nuisance upon which our determination would have to rest. In essence, the State has charged Dow Canada and Wyandotte with the commissions of acts, albeit beyond Ohio's territorial boundaries, that have produced and, it is said, continue to produce disastrous effects within Ohio's own domain. While this Court, and doubtless Canadian courts, if called upon to assess the validity of any decree rendered against either Dow Canada or Wyandotte, would be alert to ascertain whether the judgment rested upon an even-handed application of justice, it is unlikely that we would totally deny Ohio's competence to act if the allegations made here are proved true. See, *e.g., International Shoe Co.* v. *Washington,* 326 U. S. 310 (1945). 401 U. S. at 500.

The second issue, whether the discharge of pathogens into Illinois waters constitutes the commission of a tortious act in Illinois, is also well settled. For purposes of the Illinois long-arm statute, "a tort is committed in the place where the injury occurs." *McBreen* v. *Beech Aircraft Corp.*, 543 F. 2d 26, 28 (7th Cir. 1976); *Honeywell, Inc.* v. *Metz Apparatewerke,* 509 F. 2d 1137, 1142 (7th Cir. 1975); *Consolidated Laboratories, Inc.* v. *Shandon Scientific Co.,* 384 F. 2d 797, 802 (7th Cir. 1967).

The District Court so plainly had jurisdiction that the issue is not worthy of certiorari.

of liability, the appellate court engaged in an extensive review of the evidence and applied the "clearly erroneous" standard of Rule 52(a), Fed. R. Civ. P.

On the question of remedy, the Court of Appeals affirmed the district court's order that all sewage be collected. The appellate court gave three reasons for its affirmance:

> 1. Of primary significance was the repeated admission by defendants that discharge of raw sewage was not an acceptable long-term alternative to collection and treatment:
>
> > It is doubtful whether anyone, layman or expert, would argue that the discharge of raw sewage into public waters is a satisfactory alternative to collection and treatment of sewage, even though it may be conceded that it may take time to fund and provide collection and treatment facilities, and therefore the raw sewage discharges may have to be endured for the short term. Donald Weiland, Director of Engineering for the Sewerage Commission of the City of Milwaukee, flatly stated that discharging raw sewage into public waters as a permanent solution to sewage overloads was not "sound sanitary engineering practice."
> >
> > > Q. As a design engineer responsible for designing sewers with adequate hydraulic capacity, do you consider it sound sanitary engineering practice to design and install overflow devices which are intended to permit the discharge of raw sewage as a permanent solution to hydraulic overloads on an interceptor system?
> > >
> > > A. Certainly not.
> >
> > [Tr. 201.] Similarly, Dale Lundy, a hydraulic and sanitary engineering consultant called by plaintiffs, testified that collection and treatment is "considered preferable" to discharge of raw sewage. [Tr. 907.] Defendants point to nothing in the record that would even suggest that the discharge of raw sewage into public waters is either an acceptable long range solu-

> tion to the problem of disposing of human wastes or a practice that can be regarded as safe. (Appendix A-34 to A-35.)

2. The appellate court also noted the inherent illogic in requiring municipalities to build and operate massive treatment plants to meet specific effluent limitations if in the same area the same municipalities could discharge raw sewage at will from the collection system:

> It would be senseless to prohibit the discharge of effluent from publicly owned treatment works not meeting the secondary treatment requirements of § 301(b)(1)(B), if raw sewage can nonetheless be discharged at will from overflow points before it reaches the treatment works. (Appendix A-32 to A-33.)

3. Finally, the appellate court noted that the consent decree signed by Milwaukee with the State of Wisconsin[9] was virtually open-ended and set no specific dates by which all overflows would be eliminated (Appendix A-34). In contrast the appellate court noted that defendants had stipulated as to the feasibility of the completion date requirements in the federal Judgment Order:

> Defendants concede the feasibility of the completion date requirements. (Appendix A-38.)

On the question of what treatment is necessary to destroy viruses, the appellate court had doubts about the need for the degree of treatment ordered by the district court. Rather than apply the "clearly erroneous" standard to the evidentiary basis of the district court's treatment remedy or alternatively to remand for the taking of additional evidence, the appellate court

---

9. Milwaukee's NPDES permits simply allowed overflows to occur without any treatment or collection requirements. All the permits contained was an ill-defined obligation to "initiate programs leading to elimination or control of overflows" (Appendix A-33). As the federal trial was coming to a close, Milwaukee entered into a secretly negotiated "consent" agreement with the State of Wisconsin (DX 1311) which Milwaukee then and now claims bars more specific federal court action.

adopted the "secondary" treatment limits imposed by § 301(b)(1)(B) of the Clean Water Act. The appellate court adopted the United States Environmental Protection Agency's definition of secondary treatment (40 C. F. R. Part 133) as that level of treatment sufficient to destroy virus, on the extra-record assumption that EPA had concluded the "30/30" secondary limit was sufficient to destroy virus.

As emphasized in Illinois' petition, the appellate court had no record support for this assumption. Indeed, all the evidence in the record was to the contrary—*i.e.* that a 30/30 limit would allow billions of viruses to be discharged daily from defendants' plants. Moreover, by unquestioningly accepting "secondary" treatment (*i.e.* 30/30) as the basis for applying its "common law of the statute" theory (A-21, A-23, A-46), the appellate court ignored the entire statutory mechanism under Sections 303, 302 and 301(b)(1)(C) of the Clean Water Act[10] for imposing more stringent effluent limitations on public and private point sources to protect valuable water quality resources, such as Lake Michigan. This question of treatment levels is discussed extensively in Illinois' petition and need not be discussed further here.

---

10. 33 U. S. C. §§ 1313; 1312; 1311(b)(1)(C).

## REASONS FOR DENYING THE WRIT.

### I.

### THE DISTRICT COURT'S COLLECTION ORDER IS NOT INCONSISTENT WITH THE CLEAN WATER ACT.

In a rather disjointed argument unsupported by citations to legal authority, Milwaukee attempts to characterize the district court's order that raw sewage be collected as contradictory to the Congressional policy set forth in the Clean Water Act. Milwaukee submits a melange of arguments—all of which are erroneous.

#### A. Congress Did Not Preempt the Imposition of More Stringent Requirements Than Those Imposed Under the Clean Water Act.

A careful reading of the Clean Water Act, 33 U. S. C. §§ 1251 *et seq.* clearly establishes Congress' intent to allow the imposition of requirements more stringent than those required by the Act and to preserve all remedies—both statutory and common law—which existed prior to the statute.

Defendants have ignored Section 510 of the 1972 Amendments, 33 U. S. C. § 1370, which expressly allows a state or political subdivision to impose more stringent requirements:

> 1370. *State authority.* Except as expressly provided in this Act, nothing in this Act shall (1) preclude or deny the right of any State or political subdivision thereof or interstate agency to adopt or enforce (A) any standard or limitation respecting discharges of pollutants, or (B) any requirement respecting control or abatement of pollution; except that if an effluent limitation, or other limitation, effluent standard, prohibition, pretreatment standard, or standard of performance is in effect under this Act, such State or political subdivision or interstate agency may not

> adopt or enforce any effluent limitation, or other limitation, effluent standard, prohibition, pretreatment standard, or standard of performance which is less stringent than the effluent limitation, or other limitation, effluent standard, prohibition, pretreatment standard, or standard of performance under this act; or (2) be construed as impairing or in any manner affecting any right or jurisdiction of the States with respect to the waters (including boundary waters) of such States.

The House Public Works Committee stated:

> The Committee considers section 510 to be of extreme importance in assuring the States of the right to adopt or enforce provisions at least as strict as those established in this legislation. Thus, *the Committee rejected in most instances suggestions for preemption by the Federal Government* and preempted the States only where the situation warranted it based upon the urgent need for uniformity such as in section 312(f) relating to marine sanitation devices. Vol. 1 Congressional Research Service, *A Legislative History of the Water Pollution Control Act Amendments of 1972*, 823. (Hereinafter cited as "Legislative History"; emphasis added.)

Since the passage of the 1972 Amendments, the courts have uniformly recognized the rights of states or local subdivisions to require more stringent requirements than the national minimum.

> By contemplation of minimum federal standards, however, Congress did not intend to relegate the States to the status of enforcement agents for the executive branch of the federal government. To the contrary, it is indisputable that Congress specifically declined to attempt a preemption of the field in the area of water pollution legislation, and as much as invited the States to enact requirements more stringent than the federal standards. *Mianus River Preservation Comm.* v. *E.P.A* , 541 F.2d 899, 906 (2d Cir. 1976).

Such tougher state requirements can be imposed by state statutory requirements or as the result of state common law nuisance

actions.[11] *See, Committee for Jones Falls* v. *Train,* 539 F. 2d 1006, 1009 n. 9 (4th Cir. 1976); *see* also, *Metropolitan Sanitary District* v. *United States Steel Corp.,* 30 Ill. App. 3d 360, 323 N. E. 2d 426, 434 (1st Dist. 1975), *cert. denied* 424 U. S. 976 (1976); *People ex rel. Scott* v. *United States Steel Corp.,* 40 Ill. App. 3d 607, 352 N. E. 2d 225, 229 (1st Dist. 1976); *Illinois* v. *City of Milwaukee,* 366 F. Supp. 298 (N. D. Ill. 1973); *Cf., Village of Glencoe* v. *Metropolitan Sanitary District,* 23 Ill. App. 3d 868, 320 N. E. 2d 524 (1st Dist. 1974).

Nor did Congress in any way seek to restrict this right to more stringent standards in the 1977 Amendments. In the Senate Report on the 1977 Amendments, the Senate Public Works Committee states:

> There is nothing in these new provisions which in any way preempts the rights of States to have more stringent water quality standards or associated effluent limitations; . . . S. Rep. No. 95-370, p. 43, 4 Legislative History, 676.

Just as states and their political subdivisions were entitled to require more stringent discharge requirements under the Act, so also were their various pre-existing common law and statutory remedies preserved. Section 505, 33 U. S. C. § 1365, creates a specific statutory cause of action for any citizen—regardless of standard—to enforce any effluent limits imposed by the Act. By its express terms the cause of action created by Section 505 is limited to enforcing the specific limits set under the FWPCA. Section 505 does not create any right to enforce obligations not in the Act.

Milwaukee seeks to characterize a common law nuisance action as an action brought under § 505 and therefore subject to the permit defenses of § 402(k). However, common law

11. Indeed, under the Clean Water Act, the EPA Administrator must take cognizance of these more stringent standards and incorporate them into the EPA permit. Under § 301 of the FWPCA, a publicly-owned treatment works must meet "any more stringent limitation" beyond secondary treatment established pursuant to any state or other federal law. § 301(b)(1)(C), 33 U. S. C. § 1311 (b)(1)(C).

nuisance actions are not statutory actions brought under § 505. *Stream Pollution Control Board* v. *United States Steel Corp.*, 512 F. 2d 1036, 1041 (7th Cir. 1975).

Congress wanted to make clear that Section 505 did not bar any other action which might exist—as here—under common law or statute. Section 505(e) of the 1972 Amendments states:

> (e) Nothing in this section shall restrict any right which any person (or class of persons) may have under any statute or common law to seek enforcement of any effluent standard or limitation or to seek any other relief (including relief against the Administrator or a State agency). 33 U. S. C. § 1365(e).

The House Report on the 1972 Amendments states:

> Subsection (e) provides that the right of persons (or class of persons) to seek enforcement or other relief under any statute or common law is not affected. 1 *Legislative History* 821.

Likewise, the Senate Report says:

> It should be noted, however, that the section would specifically preserve any rights or remedies under any other law. Thus, if damages could be shown, other remedies would remain available. Compliance with requirements under this Act would not be a defense to a common law action for damages. 2 *Legislative History* 1499.

As the Illinois Appellate Court held in rejecting an argument by United States Steel Corporation identical to that made by defendants here:

> The clear intent of Congress to allow the states or their political subdivisions the primary responsibility for enforcing their own, *more stringent standards by common law nuisance actions* [citations omitted] or the equally clear intent of our legislature to confer that responsibility on the Attorney General [citations omitted] would be thwarted by a stay of these proceedings. *People ex rel. Scott* v. *United States Steel Corp.*, 352 N. E. 2d at 228-229. (Emphasis added.)

All federal courts which have considered the question uniformly refused to strike common law nuisance claims on the grounds that they had been pre-empted by the Clean Water Act. *California Tahoe Regional Planning Agency* v. *Jennings,* 594 F. 2d 181, 193 (9th Cir. 1979); *Township of Long Beach* v. *City of New York,* 445 F. Supp. 1203, 1214-15 (D. N. J. 1978); *U. S.* v. *Outboard Marine Corp.,* ..... F. Supp. ....., 12 ERC 1346, 1348 (N. D. Ill. 1978); *Board of Supervisors of Fairfax County, Virginia* v. *U. S.,* 408 F. Supp. 556, 562 (E. D. Va. 1976); *U. S.* v. *Ira S. Bushey & Sons, Inc.,* 363 F. Supp. 110, 120 (D. Vt. 1973); *U. S.* v. *Lindsay,* 357 F. Supp. 784, 794 (E. D. N. Y. 1973); *U. S. ex rel. Scott* v. *U. S. Steel,* 356 F. Supp. 556, 559 (N. D. Ill. 1973); *U. S.* v. *Ira S. Bushey & Sons, Inc.,* 346 F. Supp. 145, 149 (D. Vt. 1972), *aff'd* 487 F. 2d 1393 (2d Cir. 1973), *cert. den.,* 417 U. S. 976 (1974). *Cf., Committee for the Consideration of the Jones Falls Sewage System* v. *Train,* 539 F. 2d 1006 (4th Cir. 1976).

Milwaukee cites *Jones Falls, supra,* as supporting the principle of preemption. However, that court held that a federal common law nuisance claim is barred where the alleged pollution was wholly intrastate. 539 F. 2d at 1010. Moreover, *Jones Falls* did recognize that the Clean Water Act did not preempt *state* common law nuisance actions, even if state common law nuisance actions imposed stricter standards. *Id.* at 1009 and n. 9.

### B. The Statutory Procedure Under the Act Itself Contradicts Milwaukee's Arguments.

Apart from the express provisions of the Clean Water Act preserving the rights of states to impose more stringent requirements than those imposed by the Act, the statutory scheme of the Act itself contradicts Milwaukee's arguments:

> 1. While Congress has authorized the EPA Administrator to extend the deadline for publicly-owned treatment plants to meet secondary [§ 301(b)(1)(B)] or more strin-

gent limits imposed pursuant to § 301(b)(1)(C)[12]—where federal funds have not been available—this deadline can only be extended to "no later than July 1, 1983." 33 U. S. C. § 1311(i)(1). Congress did not authorize extensions beyond 1983. Here, by contrast, the district court's order is much more lenient, calling for completion by 1989.

2. Apart from the express statutory extension to no later than 1983, the absence of federal funding is not a defense to a discharger's failure to meet pollution limits. *State Water Control Board* v. *Train*, 554 F. 2d 921, 924-927 (4th Cir. 1977). Availability of federal funding under Title II of the Clean Water Act is not and cannot be a defense to compliance with Title III—either as to the secondary limits of § 301(b)(1)(B) or the more stringent limits of § 301(b)(1)(C).

3. The "cost-effective" analysis which Milwaukee cites so blithely does not relate to exemptions from the requirements of Title III. The "cost-effective" analysis requirement is simply that if federal funds are requested, federal funds granted under Title II be used for the least cost alternative which achieves the limitations imposed by Title III. Under Title III the results must be the same—achievement of the effluent limits of § 301(b)(1)(B) or § 301(b)(1)(C). Cost-effective analysis simply requires that those limits be achieved in the least cost way if federal grants are used to fund the achievement of these limits. *See* 40 C. F. R. Part 35, Subpart E, Appendix A.

Indeed, § 217 of the Clean Water Act—cited by Milwaukee—is directly related to selection of the least cost alternative to meet the Title III requirements. The legislative history of that section discloses Congress' concern that the pre-1977 cost-effectiveness guidelines had a strong bias toward funding conventional treatment in meeting the

12. Water quality related effluent limits imposed pursuant to the procedures of § 303 or § 302 or more stringent limits imposed under state law are preserved under § 510, 33 U. S. C. § 1370.

requirements of the Act. The basic purpose of § 217 was to require identification of innovative alternatives such as recycling of waste and beneficial uses of sewage as least-cost alternative means of meeting Title III limits. *See* S. Rep. 370, 95th Cong., 1st Sess., 40; H. Rep. 280, 95th Cong., 1st Sess., 73 (1977).

Neither Illinois nor the district court had any quarrel with the principle that Milwaukee should be allowed to pursue the least cost alternative in collecting its raw sewage. Indeed, as discussed above, the Judgment Order—drafted in concert by Milwaukee and Illinois—provides for modification to allow lower cost methods of collection to be installed if Milwaukee can establish that such methods are feasible. Moreover, Milwaukee has recently informed Illinois that it has developed such lower cost alternatives and wishes to submit these lower cost alternatives to the district court pursuant to the modification provisions of the Judgment Order. The preliminary cost information provided by Milwaukee indicates that separation of the sewers provides the least cost alternative to accomplishing the district court's collection order and that such costs are less than or approximately the same as the costs of meeting the open-ended consent decree with Wisconsin.[13]

4. Apart from the minimum requirements of the Act, the Act provides special procedures for protecting pure bodies of water such as Lake Michigan. Under the Act, each body of water is given individualized analysis to determine its desired uses and water quality needs. From this assessment of the desired uses and water quality needs, effluent limits tailored to the specific water quality needs of the receiving body of water can be fashioned. These limits are called "water quality related effluent limitations"

13. Again, these cost questions are properly placed before the district court under the Judgment Order rather than placed as bare allegations in a petition for certiorari.

and are mandated by § 303 and § 302 of the Act and by § 301(b)(1)(C).

Thus, contrary to Milwaukee's assertions—all municipalities are not to be treated alike. For example, dischargers into marine waters may have different effluent limits than dischargers into pure bodies of fresh water such as Lake Michigan. Each lake or river and its water quality needs are assessed on their own individualized merits.[14]

## II.

## MILWAUKEE'S EVIDENTIARY CLAIMS ARE SPURIOUS.

Milwaukee has taken snatches of the district court's findings and concocted a series of evidentiary claims that have little relationship to reality. It is sufficient to note that each of the defendants' evidentiary arguments was exhaustively examined by the appellate court and rejected. Both the district court and the appellate court found clear and convincing evidence of Milwaukee's liability (Appendix F-15; F-23; A-27). The appellate court's exhaustive analysis of the evidence is contained at pages B-2 through B-27 of the Appendix.

Defendants repeatedly cite *New York* v. *New Jersey*, 256 U. S. 296 (1921), and *Missouri* v. *Illinois*, 200 U. S. 496 (1906), as if the facts in those situations were identical to those in the instant case. But in each of those cases the plaintiff state was allowing its own dischargers to discharge equal or greater

---

14. Without getting into a name-calling match with EPA—which is just the kind of feud Milwaukee seeks to engender—neither EPA nor Wisconsin has done a water quality needs analysis of Lake Michigan from the standpoint of virus or bacteria as required by § 303 of the Clean Water Act. The only forum which has ever related Lake Michigan water quality needs regarding virus and bacteria and which has worked back to impose water quality based effluent limits was the district court in this case. It should be noted that the principal witnesses before the district court urging collection of raw wastes and effective treatment were EPA's top experts on virus and bacteria.

amounts of sewage into the same watercourse, contaminating the same water:

> Where as here, the *plaintiff* has sovereign powers and *deliberately permits discharges similar to those of which it complains,* it not only offers a standard to which the defendant has the right to appeal, but *as some of those discharges are above the intake of St. Louis,* it warrants the defendant in demanding the strictest proof that the plaintiff's own conduct does not produce the result, or at least so conduce to it that courts should not be curious to apportion the blame. *Missouri* v. *Illinois,* 200 U.S. 496, 522 (1906). (Emphasis added.)

In *New York* v. *New Jersey,* the complaining state allowed New York City to dump into the same waters seven times the volume of sewage (all untreated) as the proposed New Jersey discharge which was treated. 256 U. S. at 303.

Here, by contrast, Illinois has either completed or has under construction programs which have already eliminated or will eliminate all uncollected and untreated sewage discharges to Lake Michigan.

## III.

## THE DISTRICT COURT HAD IN PERSONAM JURISDICTION, AND VENUE WAS PROPER IN THE DISTRICT IN WHICH THE CLAIM AROSE.

As a final matter, Milwaukee has suggested that the case should have been dismissed because the District Court was without *in personam* jurisdiction over the defendants and further because venue was improper. These are disposed of easily.

### A. The District Court Had in Personam Jurisdiction.

A district court's jurisdiction over the person of a non-resident defendant is dependent upon the extra-territorial service statute of the forum State. Fed. R. Civ. P. 4(e). In this case the Illinois "long arm" statute, Ill. Rev. Stat. Ch. 110, ¶¶ 16

and 17, control. Section 17, which lists the actions of a defendant by which it submits to the jurisdiction of an Illinois court, includes "[t]he commission of a tortious act within" Illinois. The Illinois Supreme Court has construed this provision to include acts done in other states which result in injury in Illinois, *Gray* v. *American Radiator & Standard Corp.*, 22 Ill. 2d 432, 176 N. E. 2d 761 (1961), and has stated that the long arm statute authorizes "the extension of jurisdiction over nonresident defendants to the extent permitted by the due process clause." *Gray* v. *American Radiator & Standard Corp., supra,* 176 N. E. 2d at 763; *Nelson* v. *Miller,* 11 Ill. 2d 378, 143 N. E. 2d 673, 679 (1957).

Confronted with this authoritative construction of the Illinois statute, Milwaukee is reduced to arguing (1) that its discharge of raw sewage and disease-causing organisms into Illinois waters does not constitute a sufficient "minimal contact" with Illinois to support *in personam* jurisdiction; and (2) that in any event this does not constitute commission of a tortious act in Illinois.

Milwaukee's first argument comes 100 years too late. In the era of *Pennoyer* v. *Neff,* 95 U. S. 714 (1877), attempts by states to exercise jurisdiction over persons outside of their territorial limits were invalid. This archaic doctrine, as well as the entire conceptual framework which supported it, have of course been rejected. *International Shoe Co.* v. *Washington,* 326 U. S. 310 (1945); *Shaffer* v. *Harris,* 433 U. S. 186 (1977). The relevant inquiry is whether the actions of the defendant establish "certain minimum contacts with [the forum State] such that the maintenance of the suit does not offend 'traditional notions of fair play and substantial justice'." [citation omitted] *International Shoe, supra* 326 U. S. at 316.

This Court has addressed this question in the context of interstate and international water pollution in *Ohio* v. *Wyandotte Chemicals Corp.,* 401 U. S. 493 (1971). Ohio had charged Michigan and Canadian corporate defendants with pollution of Lake Erie. Deciding that Ohio State courts could

### B. Venue Was Proper in the District in Which the Claim Arose.

Venue is governed by 28 U. S. C. § 1391(b), which permits suit in *either* the "judicial district where all defendants reside, or in which the claim arose . . .". The Court's 1972 opinion in this case noted that this provision gives some "flexibility" to venue in this case. *Illinois* v. *Milwaukee, supra,* 406 U. S. at 108 n. 10.

Milwaukee contends that venue was improper in the Northern District of Illinois, and advances three reasons: (1) that the nuisance "arose" in Wisconsin; (2) that § 505 of the Clean Water Act places venue exclusively in the Eastern District of Wisconsin; and (3) that a municipality may only be sued in the District in which it is located. Each of these arguments is wholly specious.

1. Under the federal common law of nuisance an action "arises" in the place where the injury occurs. *Illinois* v. *Milwaukee,* 406 U. S. at 108 n. 10; *Ohio* v. *Wyandotte Chemicals Corp., supra,* 401 U. S. at 500. This general principle is consistent with the traditional view of tort law, which holds that "[t]he place of the wrong is in the state where the last event necessary to make an actor liable for an alleged tort takes place." Restatement, Conflict of Laws, § 377 (1934). This claim arose in Illinois.

2. Section 505(c)(1) is inapplicable to this action by its very terms:

> Any action respecting a violation by a discharge source of an effluent standard or limitation or an order respecting such standard or limitation may be brought under this section only in the judicial district in which such source is located. 33 U. S. C. § 1365 (c)(1).

This action was neither (a) respecting an effluent standard or limitation, nor (b) brought under the citizen suit pro-

visions of § 505. *See Stream Pollution Control Board* v. *United States Steel, supra,* 512 F. 2d at 1041. The venue limitations of § 505(c) are simply irrelevant.

3. Venue of an action against a municipality, based on the federal common law, is governed by § 1391(b), which allows it to be brought where the claim arose. *Illinois* v. *Milwaukee,* 406 U. S. at 108 n. 10. Milwaukee's arguments to the contrary are based upon either pre-1966 cases, which construed a different statute,[15] or on a single case involving suit against actions by Congress, in which special consideration limited venue to the District of Columbia.

Venue in this case was properly in the Northern District of Illinois.

15. The language "or in which the claim arose," which provides flexibility and a choice of venue, was added by P. L. 89-714, § 1 (1966).

## CONCLUSION.

For the foregoing reasons, the Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit, filed by the City of Milwaukee, the Sewerage Commission of the City of Milwaukee, and the Metropolitan Sewerage Commission of the County of Milwaukee, should be denied.

Respectfully submitted,

WILLIAM J. SCOTT,
Attorney General of the State of Illinois,
JOSEPH V. KARAGANIS,
SANFORD R. GAIL,
Special Assistant Attorneys General,
KARAGANIS & GAIL LTD.,
150 North Wacker Drive,
Chicago, Illinois 60606,
(312) 782-1905.

October 11, 1979.